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No. 82-131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION
owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,
Petitioner

v.

HOWARD E. PFEIFER,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION ON BEHALF OF THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

1. The proposed Amicus Curiae is the Southeastern Pennsylvania Transportation Authority (hereinafter referred to as "SEPTA"). SEPTA is a Metropolitan Transportation Authority organized under Article III of the Pennsylvania Urban Mass Transportation Law, 55 P.S. §600.301 *et seq.* SEPTA is an agency and instrumentality of the Commonwealth of Pennsylvania. It has as its legislative purpose the coordination of mass transit and commuter rail transportation in the Metropolitan Philadelphia area, which includes Philadelphia and the surrounding Counties of Bucks, Chester, Delaware, and Montgomery. The SEPTA Board, which oversees the operation of the Authority, is composed of members appointed by the Governor of Pennsylvania and by the Governments of each of the Counties and the City of Philadelphia. A Chief Operations Officer/General Manager is appointed by the Board to oversee the day-to-day operations of the Authority. SEPTA's General Counsel is the chief legal officer of the Authority.

2. At the present time, SEPTA has directly assumed some of the commuter rail operations which it had formerly assigned to Conrail as its independent contractor. Regional Railroad Reorganization Act of 1973, as amended, 45 U.S.C. §701. Beginning January 1, 1983, SEPTA will assume the remainder of those operations under the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. E, 95 Stat. 357, 643 (NRSA). Currently, SEPTA is now responsible for the handling of claims for personal injuries sustained by its railroad employees under the Federal Employers' Liability Act. 45 U.S.C. §51 *et seq.* Under the Northeast Rail Service Act of 1981, SEPTA may continue to be responsible for those job related injuries. The interest of the Amicus SEPTA in this case arises from its potential liability under the above-named federal statutes. That interest may not be

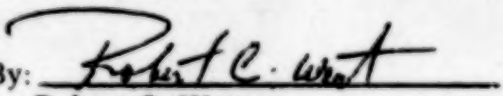
completely represented before this Court due to the limited involvement of the Petitioner and Respondent in those transportation activities which fall under the Federal Employers' Liability Act. By reason of its familiarity with the Federal Employers' Liability Act, as well as its experience in grappling with the problems generated by the case of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), the proposed Amicus is in a unique position to present to the Court a thorough exposition of the far reaching effects of the errors contained in the Third Circuit Court of Appeals decision in *Pfeifer v. Jones and Laughlin Steel Corp.*, 678 F.2d 453 (3rd Cir. 1982), relative to the introduction of evidence of future inflation.

3. The proposed Amicus will take the position that the method of evaluating inflation as proposed in *Kaczkowski, supra*, i.e., the "total offset" or so-called "Alaskan Rule", is based upon an economic fallacy and does not reflect economic reality. The proposed Amicus will not address itself to the first question presented to the Court.

4. Counsel for the Respondent has refused permission to SEPTA to file an amicus brief in this case. SEPTA, under the authority granted to it by the General Assembly of Pennsylvania, exercises the public powers of the Commonwealth as an agency and instrumentality of the state. 55 P.S. §600.303. As such, SEPTA believes that under Rule 36.4 of the Rules of the Supreme Court it need not have permission to file an amicus brief. SEPTA's request for permission to file an amicus brief, and this instant motion, are presented as a precaution in the event that its interpretation of Rule 36.4 is incorrect.

WHEREFORE, SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY respectfully requests leave of this Court to file the attached brief as an Amicus Curiae.

Respectfully submitted,

By: 

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HOWARD E. PFEIFER,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Did the lower court err in ruling that the plaintiff had a valid cause of action against his employer under Section 905 (b) of the Longshoremen's and Harbor Workers' Compensation Act?

II. Did the lower court err in applying the law of the Commonwealth of Pennsylvania, specifically the case of *Kaczkowski v. Bolubascz*, 491 Pa. 561, 421 A.2d 1027, (Pa. 1980), to a case filed under a federal statute in determining the proper measure of damages?

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INTEREST OF AMICUS

The Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") is a Metropolitan Transportation Authority organized under Article III of the Pennsylvania Urban Mass Transportation Law, 55 P.S. §600.301 *et seq.* The Authority exercises the public powers of the Commonwealth as an agency and instrumentality thereof. 55 P.S. §600.303. It is the responsibility of SEPTA to coordinate passenger and commuter transportation in the Metropolitan Philadelphia area, including Philadelphia and its four surrounding Counties. As part of its function SEPTA has already assumed a part of the commuter operations formerly handled by Conrail as its independent contractor and, on January 1, 1983, it will assume responsibility for those operations in their entirety.

The SEPTA Board, which oversees the operation of the Authority, consists of members appointed by the Governor of Pennsylvania and by the Governments of the City of Philadelphia and the four other Counties. The Authority derives its revenue from fare collections, and from subsidies from the Commonwealth and the Counties and from federal grants.

SEPTA is vitally interested in Question Two of the instant case. Its case load and exposure under a federal statute, the Federal Employers' Liability Act, (hereinafter "FELA"), 45 U.S.C. §51 *et seq.*, may grow considerably under the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. E, 95 Stat. 357, 643 (NRSA), as it assumes the functions previously performed by Conrail beginning in January, 1983. It is important, therefore, that any decision handed down by the Supreme Court relating to the measurement of damages in personal injuries cases under a federal statute be made only after a thorough exposition of the economic issues involved.

SEPTA at the present time has over three thousand active cases. Many of these cases involve the application

of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), and the Amicus is in a very strong position to demonstrate the weakness of the total offset method of handling evidence on inflation which was adopted by the Pennsylvania Supreme Court in *Kaczkowski, supra*, and applied by the Third Circuit in the instant case. If the opinion of the Third Circuit is allowed to stand, and the total offset method applied to cases brought under a federal statute, SEPTA's exposure for such damage claims will increase by millions of dollars in future years.

It is the position of the Authority that the opinion of the Third Circuit sustaining the lower court's opinion in the instant case and adopting the total offset method should be overruled and the case remanded. Counsel for the Respondent has refused to allow us to file an amicus brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit erred in applying the total offset method, adopted by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), to the case of *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3rd Cir. 1982), a personal injury action brought under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b). The Court refused to reduce the verdict to present worth as required by the decision of the Supreme Court in *Chesapeake and Ohio Railway Co. v. Kelly*, 241 U.S. 485 (1916). Furthermore, the Court's adoption of the total offset method is based upon an economic fallacy — that future inflation will equal the discount rate. In fact, interest rates are generally several points higher that the inflationary rate and it is this difference which forms the basis for the discount rate which is used to reduce a verdict to present worth.

A number of often conflicting methods have been adopted by the Circuits to handle evidence of future inflation. However, if a federal statute is involved it is necessary that the method applied for the measurement of damages in personal injury actions be uniform throughout the nation so that varying results, depended upon the standard of measurement used, can be avoided. Such variations are unfair to all parties.

Long range inflation, per se, is too mercurial and volatile to lend itself to the predictive abilities of an economist. However, if such testimony is to be used it should be confined to the particular plaintiff working in a particular job in a particular industry and in a particular locale. Generalized discussions and predictions of future inflationary rates for the economy as a whole should not be permitted. Any decision by a jury must be based upon reliable and relevant economic evidence confined to the particular plaintiff involved.

ARGUMENT

I. Uniformity Requires That a Single Method of Measurement of Damages Be Applied in Each of the Respective United States Courts of Appeals When a Claimant Seeks Damages for Personal Injuries Under a Federal Statute.

The various circuits are in disagreement as to the treatment to be given to future inflation as an element in a damage award in a personal injury suit brought under a federal statute. The issue of inflation in personal injury suits has become controversial only in the past decade when the Sixth Circuit in *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir.1974), ruled that a jury, without the benefit of expert testimony, might consider the probability of inflation in a damage award. The Court said that such a factor would fall within the common experience of the jury. Later, the Second Circuit in the case of *Feldman v. Allegheny Airlines*, 524 F.2d 384 (2d Cir.1975), allowed the concept of an inflation factor to be introduced by expert testimony in estimating a loss of future earnings. Each of the Circuits at the present time, with the exception of the First Circuit which still does not allow evidence on inflation, *Williams v. United States*, 435 F.2d 804 (1st Cir.1970), and the Fourth and District of Columbia Circuits, which have not issued an appellate decision on the issue, have established some guidelines for the consideration of inflation as evidence by the fact finder.

It is possible to break down the various methods adopted by the different circuits into five categories. The first is the theory adopted by the Second Circuit in *Feldman, supra*. In an opinion written by District Judge Lasker, the Second Circuit adopted as its rule a very lengthy lower court opinion by Judge Blumenfeld and held that a rate of discount of 1.5% was proper in reducing a verdict to present value since that rate was obtained by adjusting interest rates on "low risk" investments so as to exclude that additional interest which

might be demanded by the financial market as a hedge against the risk of inflation. Judge Blumenfeld pointed out that contemporary investors have added a substantial premium, in addition to payments for the use of their capital, as compensation for the substantial risk that when they receive back the money they have lent, that money will be worth significantly less in terms of real purchasing power. Expectations of inflation, according to Judge Blumenfeld, have driven up present interest rates to dizzying heights, even on usually safe obligations. The Judge proceeded to factor inflation out of the low risk yield and developed what he termed an inflation-free, as well as a risk-free, discount rate to be applied to the monetary value of the claimant's loss of earnings capacity to reduce it to present value. This exercise produced an inflation-adjusted discount rate of 1.5%. More recently in *Doca v. Marina Mercante Nicaraguense S.A.*, 634 F.2d 30 (2d Cir.1980), Judge Newman said that inflation should be considered by estimating the present value of lost wages, and that while the Court would not require a particular adjusted inflation rate when considering inflation, it suggested that a 2% discount rate would be fair to both sides and would be used to reduce a verdict to present value.

The Seventh Circuit in the case of *O'Shea v. Riverway Towing Company*, 677 F.2d 1194 (7th Cir.1982), aligned itself with the Second Circuit's decision in *Doca, supra*. However, it also ruled that before a verdict could be reduced to present worth, the real or inflation-free interest rate must be ascertained.

The Sixth and the Eighth Circuits have taken a position somewhat contrary to that of the Second Circuit. In *Bach, supra*, an FELA case, the Sixth Circuit questioned the ability of an economist to project inflation over a thirty year period and ruled that such testimony was inadmissible as being too speculative. Yet it held that a jury could consider the probability of inflation and that inflation was a fact of life within the common experience

of the jury. It accepted a definition of inflation as "future increases or decreases in the purchasing power of money", *Id.*, 502 F.2d at 1122. If, however, the trial judge should find that the jury overstepped its bounds, he could use the power of a remittitur to keep any such excess jury verdict within reasonable limits and insure that the verdict conformed to the evidence. A later case, *Morvant vs. Construction Aggregates Corp.*, 570 F.2d 626 (6th Cir.1978), put the decision in *Bach, supra*, into some doubt by allowing into evidence expert testimony at least as to an individual's projected productivity and the possible effect of inflation within a particular trade.

The Eighth Circuit in *Riha v. Jasper Blackburn Corp.*, 516 F. 2d 840 (8th Cir. 1979), applied Nebraska law and ruled that expert testimony on a projected rate of inflation and its effect on a permanently disabled plaintiff's future earning capacity was inadmissible. Like the Sixth Circuit in *Bach, supra*, the Court ruled that it was error for the District Court to charge the jury that it should not consider future increases or decreases in the purchasing power of money. The Court ruled that inflation is a fact of life and that while the jurors' calculations might be imprecise, there was still the power of a remittitur.

In a later FELA case, *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979), the Eighth Circuit allowed expert testimony on wage increases which the claimant might have obtained in the future. However, the Court limited such testimony only to future pay increases within the particular job classification of the plaintiff. The Court held, however, that, in FELA cases, it is an abuse of discretion for the trial court to admit expert testimony predicting a specified rate of future inflation for the country as whole. The Court believed that such a rate was so speculative and uncertain that it would open up a whole series of collateral issues which would make the trial unmanageable. Such a prediction of future inflation rates, according to the Court, would

require an exploration of an expert's view on the validity of a number of economic theories which would only waste time and confuse the fact finder. However, expert testimony on future wage increases limited to the particular job category or industry involved would not be as likely to so confuse the jury. The Court also ruled that the jury was required to discount the award for future earning capacity to its present value.

The Ninth Circuit in *United States v. English*, 521 F.2d 63 (9th Cir. 1975), held that the jury must take into account an estimate of changes in the future purchasing power of money in arriving at a damage award. The Court felt that to ignore the fact of future inflationary trends would be inconsistent with economic realities. It went on to say that, as with any other element of damages, competent evidence must be offered so that an estimate of any future inflation can be supported by sound economic evidence. The Court acknowledged problems in the prediction of future economic conditions. However, it felt that by allowing the trier of fact to take into account only those estimates of future changes in the purchasing power of money which are based on sound and substantial economic evidence, a calculation might be made by the jury with some reliability. Furthermore, it held that the Trial Court erred when it failed to discount the deceased's future earnings to present value.

The Tenth Circuit in the case of *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977), adopted the Ninth Circuit's analysis in the *English* case. The Court rejected the "total offset" method outlined in *Beaulieu v. Elliott*, 434 P. 2d 665 (Alaska 1967). It did, however, rule that the award had to be reduced to present value after the trier of fact had taken into account estimated changes in the purchasing power of money. The Tenth Circuit felt this approach, as opposed to the total offset rule, comes to grips with inflationary trends and with the problem of discounting the verdict to present worth

based upon reliable economic evidence which allows the trier of fact to arrive at a reasonably accurate verdict.

The Fifth Circuit Court of Appeals, until September 1982, was the strongest holdout against the introduction of any evidence of inflation. In *Culver v. Slater*, 688 F.2d 280 (5th Cir. 1982) (en banc), the Court reversed its decision reported at 644 F.2d 460 (5th Cir. 1980) and overruled its earlier opinion in *Johnson v. Pennrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc). The Culver Court ruled that where a federal statute is involved, expert testimony will be accepted on income increases due to inflation. Economic and labor data will be admissible and the defendant must produce data which will rebut the plaintiff's evidence. If an inflation-adjusted discount rate approach is used, the jury must consider and determine all future income losses on the basis of the claimant's present income and any likely increases which might be due to merit or productivity, but which are not due to inflation. The jury must also consider any likely increases in an acceptable inflation indicator and the rate of interest available on some safe investment. Furthermore, this evidence must be confined to the particular individual, industry and locality. Such evidence would give the jury an inflation-adjusted discount rate which would be applied to reduce the verdict to present worth. The Fifth Circuit criticized the method adopted by the Second Circuit and the total offset method approved in *Kaczkowski, supra.*

In the instant FELA case the Third Circuit applied *Kaczkowski, supra*, which had adopted what has been called the Alaskan Rule. This rule was enunicated by the Supreme Court of Alaska in *Beaulieu, supra.* According to its theory, the trier of fact first calculates the loss of earnings capacity over the plaintiff's work life expectancy. In order to account for the inflationary impact on lost future earnings and the effect of future interest rates on any lump-sum payment, a "total offset" method is then applied. Under this method, the Court does not

discount the award to its present value, but assumes that the effect of the future inflation rate will be equal to and, therefore, offset the interest rate, thereby eliminating the need to discount the award to its present value. The Third Circuit is the only Circuit Court to rule that, in a case involving a federal statute, an award must be not reduced to present value.

The application of the total offset method, which does not reduce the damage award to present valaue, is in conflict with the opinion of this Court in *Chesapeake and Ohio Railway Company v. Kelly*, 241 U.S. 485 (1916). That case was a wrongful death action under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* In *Chesapeake*, the Court held that where future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled to no more than the present value, and that since the standard for the proper measure of damages is inseparably connected with the right of action, in cases arising under the Federal Employers' Liability Act, it must be settled according to principles of federal law. In a recent case, *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980), Justice Stevens wrote that even though an action under the FELA statute is brought in state court, questions concerning the measure of damages are federal in character. It is submitted that the measurement of damages in any case brought under a federal statute should be uniform throughout all the Circuits. It is unfair to allow a claimant injured in a jurisdiction of the Third Circuit to recover a larger award than another, perhaps similarly injured individual, in another Circuit.

It can easily be concluded that confusion now reigns in the various Circuits over the proper method of calculating the impact of inflation, or lack thereof, on future earnings. This should be corrected by a pronouncement of this Court as to the standard to be applied in considering inflation in claims for personal injuries un-

der a federal statute and by a clear ruling that verdicts must be reduced to present value.

The conclusion of the Third Circuit in the instant case, that the total offset method satisfies the continued requirement of reduction to present worth as mandated in *Chesapeake, supra*, is simply not true, as will be demonstrated in Section Two. Therefore, since the Third Circuit has applied a standard of damages expressly condemned by the Supreme Court, its affirmance of the opinion of the lower court must be overruled and the case remanded.

II. The Adoption by the Third Circuit of the Total Offset Method Which Does Not Require Reducing a Verdict To Its Present Worth Is Based Upon an Economic Misconception and Is at Variance with the Decision of The Supreme Court in Chesapeake, Supra.

The Alaskan Rule assumes that the rate of inflation will equal the rate of interest and, hence, will equal the discount rate so that the one would cancel out the other and a jury's only mathematical computation is to calculate the plaintiff's projected loss of earnings through his or her projected life expectancy without regard to inflation. However, in economic reality the rate of inflation is clearly distinct from the interest rate over any period of time. The discussion below, centering upon Table 1, clearly demonstrates the basic economic reality which is completely ignored by the total offset method.

The discount rate is the rate which must be determined for the purpose of reducing a verdict to its present value. In the Commonwealth of Pennsylvania, until *Kaczkowski, supra*, the discount rate had been fixed at a 6% simple rate of interest. A discount rate is intended to reflect the probable rate of necessary return on a conservative low risk investment, in order that the discounted total amount of loss suffered through the de-

struction of one's earning capacity will, if invested in such conservative investments, earn enough interest so that the total amount of damages and accumulated interest will be equal to what the decedent would have earned had he or she had the opportunity to continue working. The determination of this rate of discount in most jurisdictions usually requires an economic expert qualified to discuss the current rates of such low risk investments which are readily available and which do not require a specialized knowledge of the financial market for an investment decision.

A review of basic data supplied from the soundest statistical sources demonstrates that rates of interest and of inflation are not equal for any span of years.[1]

Table 1 shows that the average annual rate of interest in any of several types of low-risk investments available to the average investor (with a lump sum award) is distinctly unequal to the average annual rate of inflation over similar periods. The rate of inflation is reflected most clearly in the Consumer Price Index. It is also observable that inflation is evident in increases in private non-agricultural wages. Because of the decline of overall productivity in the most recent era, it is reasonably accurate to infer that most of the non-agricultural wages have increased in response to inflation.

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1. The data appearing on Table 1 are drawn directly from the following government publications:

(a) *Historical Statistics of the United States, Colonial Times to the Present*. U.S. Dep't of Commerce; Bicentennial Edition.

(b) *Economic Report of the President*. U.S. Government Printing Office; 1980, 1981, 1982.

(c) *Statistical Abstract of the United States*. Department of Commerce; 1981.

(d) *Federal Reserve Bulletins*. Board of Governors of the Federal Reserve; 1981, 1982.

TABLE 1

INTEREST RATE AND INFLATION RATE DATA[1]

	PERIOD 1931-1980	PERIOD 1947-1980	PERIOD 1970-1980
9%—			8.57% C3AB
			8.28% PN-AW
			8.17% T-Bills (3 mos.)
8%—			8.00% CPI [1970-1981]
			7.38% USGL-78
7%—			6.23% MHGB
6%—		5.62% PRIVATE NON-AGRIC. WAGE CHANGES [PN-AW][2]	
		5.45% C3AB	
			5.15% SAIR [1970-1982]
5%—			
	4.78% Corporate Triple-A Bonds [C3AB]	4.72% USGL-TB	
		4.46% T-Bills (3 mos.)[2]	
		4.25% CPI [1947-1982]	
		4.15% MHGB	
	4.06% U.S. Gov't Long-Term Bonds [USGL-TB]		
4%—			
		3.86% SAIR [1947-1981]	
	3.76% Municipal High Grade Bonds [MHGB]		
	3.75% CONSUMER PRICE INDEX [CPI]		
	3.51% Savings Acc'ts Interest Rates [SAIR]		
3%—			
2%—		2.07% PRODUCTIVITY[3] [1948-1980][2]	
			1.18% PRODUCTIVITY [1970-1979]
1%—			

Notes

1. With reference to the Footnote in the text indicating the sources for this Table, the eight types of averages appearing in this Table are drawn from those sources, (a) through (d), as follows:

Corporate Triple-A Bonds:	(a), (b) and (c)
U.S. Gov't Long Term Bonds:	(a) and (c)
Municipal High Grade Bonds:	(a), (b) and (c)
CONSUMER PRICE INDEX:	(b) and (c)
Savings Acc't Interest Rates:	(d)
PRIVATE NON-AGRIC. WAGE CHANGES:	(b)
U.S. Treasury Bills, 3 months:	(a) and (c)
Productivity:	(b), (b), (c) and (d)

2. Data not available for first period (1931-1980).
3. Productivity, all workers.

Five of the most attractive yet conservative risk-free types of investment instruments are traced in Table 1: United States Government Long-term Bonds; Three Month U.S. Treasury Bills; Municipal High Grade Bonds; Savings Accounts; and Triple-A Corporate Bonds. Each type of instrument in any given period produces a different rate of interest. Moreover, the differences in percentage points between any two of them changes from one period to another, and the difference between any one of them and the Consumer Price Index changes from one period to another.

More importantly, the Consumer Price index is never the same as the interest rate of any one of the investment instruments. These statistics clearly demonstrate that the underlying premise in the *Kaczkowski* case is not based upon economic and historical reality but is in fact grounded upon a serious misconception of current and past economic conditions.

The idea of associating (but not equating) interest and inflation was developed in Fisher, *The Theory of Interest* (1930). Mr. Fisher noted that, when inflation increases, an enticing premium is added to the real interest rate resulting in a net rate of interest intended to maintain the real value of the principal and interest payments. That is, the loan is repaid at the inflationary dollar rate sc that the borrower is still owing the real as opposed to the inflation rate to the lender. In 1974, Judge Blumenfeld in *Feldman, supra,* went through a painstaking analysis to discover what this inflation-adjusted or inflation-free rate of return would be. He determined that a rate of 1.5% was proper. What that rate would be at the present time should be an issue for the trier of fact which is developed through sound and reliable economic evidence applied to guidelines established by this Court. However, that particular discount rate must be applied according to *Chesapeake, supra,* to the verdict in order to reduce it to present value. Judge Blumenfeld's analysis and conclusion are in complete

disagreement with the theory behind the total offset method. Similarly, the Second Circuit in *Doca, supra,* noted that the inflation rate did not cancel out the discount rate, and that the real rate of interest varied between 1.5% and 3%, which real rate would become the applicable discount rate.

The Alaskan Rule is supported by the argument that it simplifies the procedure to be utilized by a jury in arriving at its verdict. However, this economically unjustified simplification imposes a very substantial and unfair financial burden on a defendant. Let us assume that a deceased plaintiff had a life expectancy of 30 years and was making $10,000 a year at the time of the accident. Under the Alaskan Rule, you simply multiply thirty by ten thousand and come out with a verdict of $300,000. This would not be reduced to present value by any discount rate. If, however, contrary to the Alaskan Rule, a real rate of interest were used as a discount rate, the verdict would require a substantial reduction of the $300,000 to present value. A real rate of interest of only 1% would reduce that verdict by over $40,000 and a real rate of interest of 2% would reduce the verdict by over $70,000. For an entity in the position of SEPTA, which might have a number of these cases in any particular fiscal year, the difference between the application of the total offset method and the use of a discount rate to reduce the verdict to present value would rise into millions of dollars.

Because the method adopted by the Third Circuit in the instant case is inconsistent with current economic theory and since it consistently overcompensates the plaintiff at the expense of the defendant, a result never intended by Congress, this Court should rule that error was committed in using the Alaskan Rule as adopted by *Kaczkowski, supra.*

Judge Brown in the recent decision of *Culver, supra,* at page 299 said:

However, we are less than satisfied with the so-called Alaskan Rule, which by assuming that the discount rate and the inflation rate are virtually identical, unnecessarily penalizes defendants because, as noted above in our discussion of the real rate of interest, interest rates on relatively safe investments will typically ride several percentage points above the rate of inflation. In addition, tied as it is to changes in the Consumer Price Index (CPI), the result would unfairly award the plaintiff the difference between the changes in the CPI and the actual or average increase in wages.

. . . In the dynamic and ever-changing world of finance and economics, we as judges cannot rule out that the interest rate on risk-free investments might equal the inflation rate during a certain period such that the Alaskan Rule is vindicated. Indeed, the logic behind the Alaskan Rule is that in an economy of ups and downs, "it will all come out in the wash" — the interest rate and the inflation rate being, on the average, roughly equivalent. However, any standard which is inflexible in a dynamic economy will likely be unable to cope with the problem of preventing windfalls either to plaintiff or defendant. Although a perfect method may never be found, we must attempt to create standards that are fair to both sides of the controversy, with the trier of fact being allowed to receive and act upon credible evidence of the economic facts bearing, pro and con, on the competing theories.

The Amicus believes that the adoption by the Third Circuit of the total-offset method imposes by design an unfair economic penalty upon the defendant.

III. The Introduction Into Evidence of a General Rate of Future Inflation for the National Economy is Too Speculative to be Considered by the Fact Finder.

It is the position of the Amicus that a general pattern of inflation is still too remote, volatile, and speculative to be the subject of testimony from any trained economist. Recent economic news indicates a rate of inflation of only a few percentage points, but the percentage varies in each particular area. This compares favorably with the double-digit inflation which faced the country only two years ago. It could be pointed out that on the national level we have experienced steadily rising prices since the Second World War. However, the deflation of the Great Depression clearly shows that to assume continuing inflation over the next ten, twenty, thirty, or more years would be error. It is no surprise that the debate between trained economists over future inflationary trends continues to rage inconclusively at the national level.

As noted earlier, the Courts in the Sixth and Eighth Circuits believe that the evaluation of inflation should be left to the trier of fact based upon his or her common experience. Such a crystal ball guess is grossly unfair to all parties. The experience of any juror in dealing with inflation would be limited by that person's memory which might be confined only to recent years.

The very factors which might restrain or catalyze inflation are so myriad and hidden as to make unpredictable the rate of inflation only one year hence. As the Eighth Circuit in *Taenzler, supra,* stated, the prediction of future inflation at a specified rate is so speculative and uncertain that it would open up a trial to a plethora of collateral and remote considerations. Any prediction can only be done after the exploration of a number of experts' views on world finance and a clash of economic theories. It is the position of the Amicus that the craft and science of the economist has not advanced to the

point where one can forecast with any degree of certainty the existence of a specific nationwide rate of inflation over any long range period of time. Instead, economic and other experts should be used to show the possibility of income increases, whether through inflation or merit, within a particular job classification or a particular industry. However, that testimony should be limited solely to the specific job situation in which the plaintiff was employed and should not be permitted to extend into the highly speculative nature of nationwide future rates of inflation.

The recent decision in *Culver, supra,* outlined the problems of testimony specifying a general rate of inflation without reference to the particular plaintiff. Judge Brown said at page 296:

> In theory, the real rate of interest represents a possible standard for determining the proper and fair discount rate to be applied to damages resulting from the loss of future income. For courts using this method, the rate of inflation, however calculated, is subtracted from the interest rate for some relatively risk-free investment, and the remainder is the real rate of interest, or discount rate, to be applied to the damage award. In practice, of course, the problem becomes more difficult. Even where parties to a controversy are able to establish both a projected inflation rate and an interest rate on some risk-free investment, using legally acceptable indexes and tables, the fact remains that the goal of the exercise is to compensate the plaintiff for the income the worker would in all probability actually receive in future years. It is well-recognized that the average wage increases of many workers in the United States have not kept up consistently with inflation. This factor, then, must be applied to increase (e.g., from 2% to 4%) the discount rate so that the plaintiff, whose wages have not kept up and likely will

not keep up with inflation, will not receive increases based upon inflation. On the other hand, if the average annual increase in wages in a particular profession has risen above the inflation rate, the plaintiff should not be limited to increases based upon the inflation rate. This factor highlights the major weakness of the "real rate of interest" approach.

A simpler and more accurate approach to the problem is found where the plaintiff shows by expert testimony or otherwise, all of the increases in wages he is likely to receive during his work-life expectancy. Likely increases in wages due to cost of living increases, merit or productivity increases, or promotion increases could all be separately established by the plaintiff in computing the total amount of lost wages. For most occupations, it is easy to find economic data of general wage increases, which include increases due to cost of living, merit and productivity. The more difficult task of breaking down the data into the reasons for the increase, e.g. cost of living or merit increases, is not necessary in this simpler method. Then, the defendant has the opportunity to establish, by expert testimony or otherwise, the discount rate which reflects the rate of interest in a relatively safe investment, which is applied to the award to reduce it to present value. If the methodology is followed, the rate of inflation itself is not directly involved — inflation is only indirectly reflected (i) in the cost of living increases projected by the plaintiff (which may be more or less than the rate of inflation), and (ii) in the discount rate established by the defendant (which includes both the real rate of interest and the predicted effect of inflation). The result of such a calculation should not differ greatly from the result obtained through the *Feldman* approach. However, unlike the *Feldman* approach this alternative method would more accurately represent the future

wage lost by a particular plaintiff, in a particular occupation, in a particular geographic area.

The *Culver* decision supported each of its conclusions with reliable economic tables and evidence. This Court should rule that evidence concerning general inflationary trends or a specified general rate of inflation should not be allowed in any case involving a federal statute, and that all evidence concerning inflation and its effects on future loss of earnings should be confined to a particular plaintiff, in a particular occupation and in a particular geographic area.

IV. If the Fact of Inflation Is to Be Presented to the Fact Finder, the Method to Be Used Is That Adopted by the Ninth Circuit Court of Appeals in English, Supra, and Refined by the Fifth Circuit in Culver, Supra.

If this Court should agree that the fact of inflation is one which should be taken into consideration by the fact finder, then the method adopted by the United States Court of Appeals for the Ninth Circuit in *English, supra*, and the recent refinements discussed by the Fifth Circuit in *Culver, supra*, should receive the express approval of the Court. Together, those decisions make two large improvements over the method adopted by the Third Circuit in the *Pfeifer* case. First, they hold that a court must discount a verdict to present worth. These cases are, therefore, in conformity with the decision of this Court in *Chesapeake, supra*, by requiring that such a reduction be made. Secondly, both decisions require that competent economic evidence be introduced on the subject of future inflation, as it might effect the particular plaintiff and his particular situation. Any estimate of inflation must be supported by sound and substantial evidence. Moreover, neither case permits that unfettered discretion by the jury which the Sixth Circuit allowed in *Bach, supra*, and the Eighth Circuit sanction in *Riha*,

supra. No burden then is placed upon a trial judge to second guess a jury as to how it arrived at its verdict, and the use of the power of a remittitur to bring a verdict within reasonable boundries is not encouraged.

The real problem with the instant case is its complete exclusion of expert testimony as to inflation. As noted earlier in Section II, there is always a difference between the rate of inflation and the rate of interest, even though the two may tend to move in a non-parallel fashion in the same direction. The trier of fact, aided by competent testimony concerning the percentage most particularly relevant to the plaintiff in his or her occupation and region, must be allowed to identify the most appropriate discount factor to reduce the verdict to present value. The Amicus disagrees with the theory, now adopted by the Second Circuit in the case of *Doca, supra*, which approved a specific discount factor of 2% to be applied to all cases. The Amicus believes that the discount value in each individual case should be established through expert testimony. Furthermore, the trier of fact, by the use of a specially tailored verdict sheet, should be required to show how it arrived at any particular discount factor. Judge Brown in *Culver, supra*, at page 306, outlined a jury's various calculations in reaching a verdict. The soundness of Judge Brown's approach is recommended to the Court.

The Amicus strongly believes that the prediction of specific inflation rates for the country as a whole should not be permitted. However, if such general predictions are made, they must relate to the potential losses of the particular plaintiff's future earning capacity as opposed to economic society in general. In *Vesey v. United States*, 626 F.2d 627 (9th Cir. 1980), the Ninth Circuit held that since evidence as to general inflationary trends had never been related to the components of the claimant's future earnings, the trial court properly refused to accept any general inflation factor to increase the verdict. This Court should bar speculation as to national in-

flationary trends. However, if it believes that such testimony is needed, the Court should confine the economic expert's testimony to the industry or type of work which the claimant was performing. As the Fifth Circuit said in *Culver, supra*, expert testimony as to inflationary trends must be confined to the particular plaintiff working in a particular job in a particular industry in a particular geographical location. By such testimony, tailored to the case at hand, the trier of fact would have a reliable method of reaching an accurate verdict while avoiding the possibility of either an inadequate verdict or a windfall for the plaintiff.

This Court, in the *Norfolk* case, an action under the Federal Employers' Liability Act brought in a state court, ruled that the question concerning the measure of damages in a case under a federal statute is federal in character. It is necessary in cases involving federal statutes that a single method of considering inflation be adopted since the measurement of damages should be uniform throughout the Federal Courts. However, the methods now used by the various circuits will lead to substantially varying results. The Amicus urges the method adopted by the Ninth Circuit in *English, supra*, as modified by the Fifth Circuit in *Culver, supra*, as the best method which protects all of the parties involved.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit in the *Pfeifer* case is in error in that it applied the total offset method of calculating future loss of earnings and failed to reduce the verdict to present worth. This method is in conflict with the decision of the United States Supreme Court in *Chesapeake, supra*, since it systematically overcompensates a claimant. This inequitable result must be corrected by this Court's reversal of the decision of the United States

Court of Appeals for the Third Circuit with proper guidelines to be followed by all Federal Courts in the calculation of future loss of earnings under federal statutes.

Respectfully submitted,

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